

THE DEVELOPMENT OF THE *PARKER* DOCTRINE

## I. INTRODUCTION

Antitrust laws in general, and the Sherman Act in particular, are the Magna Carta of free enterprise. They are as important to the preservation of economic freedom and our free enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms. And the freedom guaranteed each and every business, no matter how small, is the freedom to compete—to assert with vigor, imagination, devotion, and ingenuity whatever economic muscle it can muster.<sup>1</sup>

The premier case of *Parker v. Brown*<sup>2</sup> established the general principle that anticompetitive actions undertaken by or at the direction of sovereign states should be exempt from the federal antitrust laws. The Sherman Act,<sup>3</sup> as the principal antitrust legislation, provides in part that “[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade, or commerce among the several states, or with foreign nations, is hereby declared to be illegal.”<sup>4</sup> It has been suggested by at least one authority that state action immunity was developed to accommodate the antitrust laws to an economic system in which states regulate industries and eliminate competition in varying degrees, and for varying purposes.<sup>5</sup> However, what constitutes “state action” has generated significant controversy. It is established that the term comprehends statutes enacted by all governmental legislative bodies and the official actions of all government officers. The more difficult problems arise when the conduct of private groups or individuals is allegedly illegal or unconstitutional.<sup>6</sup>

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1. United States v. Topco Assocs., Inc., 405 U.S. 596, 610 (1972).

2. 317 U.S. 341 (1943).

3. 15 U.S.C. § 1 (1980).

4. *Id.* Section 2 makes it unlawful to “monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States.”

5. Morgan, *Sherman Act Violations and State Action*, 35 ARK. L. REV. 273 (1981).

6. W. LOCKHART, Y. KAMISAR & J. CHOPER, *CONSTITUTIONAL LAW* 1514-15 (5th ed. 1980). The issues and circumstances indicative of state action in constitutional situations are remarkably similar to those considered in antitrust cases.

In determining whether an activity constitutes state action, "courts must examine whether a sufficiently close nexus exists between the state and the challenged action, so that the practice may fairly be treated as that of the state itself."<sup>7</sup> Despite such definitions, the Supreme Court of the United States has struggled to apply the concept of "state action" to local municipalities allegedly in violation of antitrust laws. Local governments need clear and concise guidelines in order to determine what practices they will be held legally liable for. Until recently, the law has been evolving, and states have been uncertain regarding their exposure to antitrust laws.

This note will address the tests and rationales as applied by the United States Supreme Court in its consideration of the state action immunity doctrine, beginning with the keystone case of *Parker* and concluding with the most recent case before the Court, *Hoover v. Ronwin*.<sup>8</sup>

## II. *PARKER*—SETTING THE STANDARD

In *Parker*, the Court was called upon to consider the California Agricultural Prorate Act which authorized a regulatory scheme restricting competition among private growers of raisins and maintaining prices to packers.<sup>9</sup> "The declared purpose of the act is to 'conserve the agricultural wealth of the state' and to 'prevent economic waste in the marketing of agricultural products' of the state."<sup>10</sup> An advisory commission was created to formulate and oversee proration marketing programs for the respective zones that were established.<sup>11</sup>

The specific proration program at issue became effective on September 7, 1940. Receiving stations were established in the zones to which the producers were required to deliver all raisins which they desired to market.<sup>12</sup> Raisins delivered to the receiving stations were to be distributed by the committee so as to obtain stability in the market.<sup>13</sup>

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7. BLACK'S LAW DICTIONARY 1262 (5th ed. 1979).

8. 104 S. Ct. 1989 (1984).

9. *Parker*, 317 U.S. at 346.

10. *Id.*

11. The commission was composed of nine members including the Director of Agriculture who was serving ex-officio. The governor appointed the other eight members for four-year terms. *Id.*

12. *Id.* at 347. The number of receiving stations in a particular zone was dependent upon the amount of business carried on in that specific area.

13. *Id.* at 348.

The plaintiff, a producer and packer of raisins, sought to enjoin the continuance of the program, asserting that it was invalid under the Sherman Act as well as the commerce clause.<sup>14</sup> The Court, per Chief Justice Stone, held the program valid, notwithstanding that "the California prorate program would violate the Sherman Act if it were organized and made effective solely by virtue of contract, combination or conspiracy of private persons, individuals or corporate."<sup>15</sup>

The Court specifically emphasized that the program's authority was by virtue of legislative command of the state and found nothing in the Sherman Act or its history indicating a purpose of restraining a state, its officers, or its agents from legislatively directed activities.<sup>16</sup> Chief Justice Stone continued by concluding that the Sherman Act does not mention the state *per se* and gives no indication of being directed at restraining state action or state directed conduct.<sup>17</sup> Applying these guidelines, the California Prorate Act is apparently free from Sherman Act restrictions as the state has created the machinery for conducting the private program. Thus state officials appeared to be *per se* excluded from antitrust liability.

Thus, the Court set forth the *Parker* doctrine which many future courts would interpret and rely on for guidance.

### III. DEFINING THE STANDARD

After a period of relative inactivity concerning state antitrust immunity, the Court responded to the concern that states and municipalities were sheltering too much conduct that contravened the antitrust laws, i.e., restrictive licensing practices and state action masking for private cartels.<sup>18</sup>

The state action doctrine was next considered in the case of

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14. *Id.* at 344. The defendants included the State Director of Agriculture, the Raisin Proration Zone No. 1, members of the State Agricultural Prorate Advisory Committee, and members of the Program Committee for Zone No. 1.

15. *Id.* at 350. The Court also assumed that Congress could prohibit a state from maintaining a stabilization program because of its effect on interstate commerce. *Id.* Cf. *White v. Massachusetts Council of Constr. Employers*, 460 U.S. 204 (1983); *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794 (1976).

16. *Parker*, 317 U.S. at 350-51.

17. *Id.* at 351. The Sherman Act's legislative history indicates its purpose was not to restrain state action, but to stifle individual and corporate combinations that suppressed competition. *Id.*

18. M. HANDLER, REFORMING THE ANTITRUST LAWS 59 (1982).

*Goldfarb v. Virginia State Bar.*<sup>19</sup> The Goldfarbs<sup>20</sup> sought to purchase a house in the vicinity of Fairfax County, Virginia. The title examination required for the necessary financing was a service performed exclusively by members of the Virginia Bar. A minimum fee schedule was published by the Fairfax County Bar Association. The Goldfarbs attempted unsuccessfully to locate an attorney who would inspect the title for less than the "mandated" fee.<sup>21</sup>

The Goldfarbs sought injunctive relief and damages from the state and county bars through a class action suit, alleging the price-fixing to be in violation of the Sherman Act.<sup>22</sup> The Court engaged in a logical and precise four stage analysis inquiring: (1) whether there is price-fixing; (2) whether the activities affect interstate commerce; (3) whether a "learned profession" is exempt from the Sherman Act; and (4) whether the activities are state action within the meaning of *Parker* and thereby legally permissible.<sup>23</sup> The Court perfunctorily answered the first three questions in favor of the Goldfarbs and then focused on the fourth question concerning state action immunity.

While recognizing that the Virginia legislature authorized its highest court to govern the practice of law,<sup>24</sup> the Court stated: "The

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19. 355 F. Supp. 491 (E.D. Va. 1973), *aff'd in part, rev'd in part*, 497 F.2d 1 (4th Cir. 1974), *rev'd*, 421 U.S. 773 (1975).

20. The defendants in this action were the Virginia State Bar and the Fairfax County Bar. *Goldfarb*, 421 U.S. at 774.

21. *Id.* at 776. "[T]he minimum-fee schedule . . . provided for a fee of 1% of the value of the property involved." Attorneys would refer to a fee schedule of "recommended" minimum prices for common legal services. The Virginia State Bar indirectly enforced the fee schedule. *Id.*

22. The district court found the Virginia State Bar exempt from antitrust scrutiny but held the Fairfax County Bar liable, stating that the minimum-fee schedule violated the Sherman Act. *Goldfarb*, 355 F. Supp. at 497. On appeal, the Court of Appeals for the Fourth Circuit also held the Virginia State Bar immune under the *Parker* doctrine but reversed the lower court's ruling regarding the county bar, finding the practice of law not to be included in the Sherman Act's terminology, "trade or commerce." *Goldfarb*, 497 F.2d at 13.

23. *Goldfarb*, 421 U.S. at 780. The four stage inquiry proceeded as follows: [D]id the respondents engage in price fixing? If so, are their activities in interstate commerce or do they affect interstate commerce? If so, are the activities exempt from the Sherman Act because they involved a 'learned profession'? If not, are the activities state action within the meaning of *Parker v. Brown*, and therefore exempt from the Sherman Act?

*Id.*

24. VA. CODE ANN. § 54-48 (1972) provides:

Rules and regulations defining practice of law and prescribing codes of ethics and disciplinary procedure.—The Supreme Court of Appeals

threshold inquiry in determining if an anticompetitive activity is state action of the type the Sherman Act was not meant to proscribe is whether the activity is required by the State acting as sovereign.<sup>25</sup> The court did not inquire further into the state action issue because the Virginia Supreme Court rules did not require the activities of either the state or county bars.<sup>26</sup> The *Parker* doctrine was thus modified and further defined when the Court held: "It is not enough that . . . anticompetitive conduct is 'prompted' by state action; rather, anticompetitive conduct must be compelled by direction of the State acting as a sovereign."<sup>27</sup>

In its first state action immunity case after *Parker*, the Court seemed to focus upon the act itself rather than upon the actor. The Court rejected the subjective and lenient standard of being prompted by the state, in favor of a stronger standard requiring that the conduct be *compelled* by the state. This standard evidences the Court's desire to establish a "bright line" standard as well as new guidelines for determining the applicability of the state action immunity doctrine.<sup>28</sup>

Several years later, the Court was asked to decide whether cities were encompassed by the *Parker* exemption.<sup>29</sup> The procedural posture of this case was somewhat unique. The city of LaFayette instituted an action alleging anticompetitive practices by the Louisiana Power

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may, from time to time, prescribe, adopt, promulgate and amend rules and regulations:

- (a) Defining the practice of law.
- (b) Prescribing a code of ethics governing the professional conduct of attorneys at law and a code of judicial ethics.
- (c) Prescribing procedure for disciplining, suspending, and disbarring attorneys at law.

See *Goldfarb*, 421 U.S. at 789 n.18.

25. *Goldfarb*, 421 U.S. at 790 (citing *Parker*, 317 U.S. at 350-52 and *Continental Co. v. Union Carbide*, 370 U.S. 690, 706-07 (1962)).

26. *Id.*

27. *Id.* at 791. The Court also intimated that merely because an organization may be considered a state agency for certain limited purposes, an all-encompassing shield is not created to protect the organization from liability from all anticompetitive practices. *Id.*

28. See Burling, Lee & Quarles, "*State Action*" Antitrust Immunity—A Doctrine in Search of Definition, 1982 B.Y.U. L. REV. 809, 815 [hereinafter cited as Burling, Lee & Quarles].

29. City of LaFayette v. Louisiana Power & Light Co., 435 U.S. 389 (1978). In the interim, the Court decided *Cantor v. Detroit Edison Co.*, 428 U.S. 579 (1976) (a plurality opinion concluding that *Parker* immunized only "official action taken by state officials"), and *Bates v. State Bar*, 433 U.S. 350 (1977) (stating a "rule of reason" inquiry was necessary to determine state action immunity when holding immune from antitrust challenges Arizona laws against lawyer advertising).

and Light Company. Louisiana Power and Light counterclaimed, asserting anticompetitive practices by the city of LaFayette. The city responded by claiming the state action immunity exemption.<sup>30</sup>

The Court, per Justice Brennan, began the analysis by considering the city-plaintiff's initial claim that Congress had not intended the antitrust laws to apply to local government.<sup>31</sup> The Court properly found the Sherman Act's definition of "person" applicable to both cities and states.<sup>32</sup> In discussing the scope of the Sherman Act as applied in a previous decision, the Court reiterated that "[l]anguage more comprehensive is difficult to conceive. On its face it shows a carefully studied attempt to bring within the Act every person engaged in business whose activities might restrain or monopolize commercial intercourse among the States."<sup>33</sup> Cities are clearly encompassed within the purview of the Sherman Act.

After analyzing the city's minor contentions, the court addressed the primary assertion and found the city plainly in error in claiming that "*Parker* held that all governmental entities, whether state agencies or subdivisions of a state, are, simply by their status as such, exempt from the antitrust laws."<sup>34</sup> Relying primarily on *Parker* and *Goldfarb*, the Court concluded: (1) *Goldfarb* clarified that not every state agency action is an action of the State;<sup>35</sup> (2) limitation of the

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30. Stating that they were reluctant to hold that antitrust laws do not apply to any state activity, the district court nonetheless dismissed the private companies' counterclaim. However, the court of appeals, relying on *Parker* and *Goldfarb*, reversed, holding that the determinative issue was whether the state legislature contemplated a certain type of anticompetitive restraint. *City of LaFayette v. Louisiana Power & Light Co.*, 532 F.2d 431 (5th Cir. 1976), cert. granted, 430 U.S. 944 (1977).

31. *City of LaFayette*, 435 U.S. at 394. This contention was separate from the question of the city's exemption as an agent of the state.

32. 15 U.S.C.A. § 8 provides in full:

That the word "person," or "persons," wherever used in this act shall be deemed to include corporations and associations existing under or authorized by the laws of either the United States, the laws of any of the Territories, the laws of any State, or the laws of any foreign country.

See *City of LaFayette*, 435 U.S. at 395 n.11. See also *Georgia v. Evans*, 316 U.S. 159 (1942) (finding the words "any person" in the Sherman Act to include states); *Chattanooga Foundry & Pipe Works v. Atlanta*, 203 U.S. 390 (1906) (holding municipality to be a person).

33. *City of LaFayette*, 435 U.S. at 398 (quoting *United States v. South E. Underwriters Ass'n*, 322 U.S. 533, 553 (1944)).

34. *Id.* at 408.

35. *Id.* at 410. The Court's finding in *Goldfarb* directly supports the conclusion reached in this case. The Court there held that even though the state bar was acting within its general powers, it was engaging in an essentially private activity and thus was not executing the mandate of the state. *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975).

*Parker* exemption to official state-directed action is consistent with the failure generally to equate state subdivisions with the states themselves;<sup>36</sup> and (3) consideration of the potential economic effects if cities were free to give their own interests priority over those of the nations negated a presumption that Congress intended anticompetitive municipal action to be exempt.<sup>37</sup>

The Court balanced these considerations against the fact that cities often employ useful tools for administering state goals and objectives. After careful consideration, the Court formulated another standard governing state action immunity. Only action by the state, or its subdivisions, pursuant to state policy to displace competition with regulation or monopolistic public service, is exempted under the *Parker* doctrine.<sup>38</sup> The court further stated, "[A]n adequate state mandate for anticompetitive activities of cities and other subordinate governmental units exists when it is found 'from the authority given a governmental entity to operate in a particular area, that the legislature contemplated the kind of action complained of.'"<sup>39</sup>

Applying this standard to the facts at issue, the Court concluded that cities were not immune from the antitrust laws.<sup>40</sup> Status alone should not confer immunity from regulation. Rather, immunity must be grounded in the satisfaction of established criteria and legitimate policy considerations.

#### IV. APPLYING THE STANDARD

After substantial development of the state action immunity doctrine in a number of intervening decisions, the Court considered

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36. *City of LaFayette*, 435 U.S. at 412. See also *Lincoln County v. Luning*, 133 U.S. 529 (1890).

37. *City of LaFayette*, 435 U.S. at 412-13. In 1972, there were 62,437 different units of local government in the United States. It is easy to imagine the substantial impact on the national economic system if each local unit placed its own interests in the forefront.

38. *Id.* at 413.

39. *Id.* at 415 (quoting *City of LaFayette*, 532 F.2d at 434). This standard is almost identical to the original *Parker* test. In a new area of law or when the law is being expanded to cover new areas, it is a safe and common practice to give deference to legislative intent. The Court was strongly influenced by this consideration.

40. In a concurring opinion which focused on the nature of the activity in question rather than on the identity of the actors, the Chief Justice viewed the *Parker* exemption as extending to the municipalities only when they engaged in traditional governmental functions and inapplicable when concerned with proprietary enterprises of municipalities. *Id.* at 420, 422, 424 (Burger, C.J., concurring).

*California Retail Liquor Dealers Association v. Midcal Aluminum, Inc.*<sup>41</sup> A California statute required all wine producers and wholesalers to file fair trade contracts or price schedules with the state, or alternatively, required wholesalers to post a resale price schedule.<sup>42</sup> In July 1978, Midcal Aluminum, a wholesale wine distributor, was charged by the Department of Alcoholic Beverage Control with selling twenty-seven cases of wine for a lower price than the price schedule of the Ernest and Julio Gallo Winery. Midcal admitted liability under the statute and instituted action seeking injunctive relief against the state's wine pricing system.<sup>43</sup>

The Court, per Justice Powell, found the threshold inquiry to be whether the California wine pricing plan violated the Sherman Act. He further noted the reluctance of other courts to uphold retail price maintenance schedules.<sup>44</sup> Thus, a program or industry must be entitled to special antitrust immunity in sustaining its resale price maintenance and fair trade contracts.

Refining earlier decisions, the Court set forth a new two-pronged standard for state action immunity. Not only must the challenged restraint be "one clearly articulated and affirmatively expressed as state policy," but "the policy must also be 'actively supervised' by

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41. 445 U.S. 97 (1980). The Court also considered the implication of the twenty-first amendment which prohibits the transportation of liquor into a state in violation of the state's law. However, this matter is beyond the scope of this note.

42. CAL. BUS. & PROF. CODE ANN. § 24866 (West 1964), provides as follows:

Each wine grower, wholesaler licensed to sell wine, wine rectifier, and rectifier shall:

(a) Post a schedule of selling prices of wine to retailers or consumers for which his resale price is not governed by a fair trade contract made by the person who owns or controls the brand.

(b) Make and file a fair trade contract and file a schedule of resale prices, if he owns or controls a brand of wine resold to retailers or consumers.

See *California Retail Liquor Dealers Ass'n*, 445 U.S. at 99 n.1. See also *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 384 (1951) (striking down a similar statute).

43. The California Court of Appeals for the Third Appellate District, relying on *Rice v. Alcoholic Beverage Control Appeals Bd.*, 21 Cal. 3d 431, 579 P.2d 476 (1978), held the wine pricing scheme violated the Sherman Act because the state played only a passive role in the liquor pricing. *Midcal Aluminum, Inc. v. Rice*, 90 Cal. App. 3d 979, 153 Cal. Rptr. 757 (1979).

44. *California Retail Liquor Dealers Ass'n*, 445 U.S. at 102 (citing *Albrecht v. Herald Co.*, 390 U.S. 145 (1968); *United States v. Parke, Davis & Co.*, 362 U.S. 29 (1960); *United States v. A. Schrader's Son, Inc.*, 252 U.S. 85 (1970); *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U.S. 373, 407 (1911)).

the state itself.<sup>45</sup> Although satisfying the first prong, the program failed the second prong of the test. Finding a near lack of active state involvement, the Court held that "the national policy in favor of competition cannot be thwarted by casting such a gauzy cloak of state involvement over what is essentially a private price-fixing arrangement."<sup>46</sup>

The Court's opinion articulated the factors paramount in its decision. The majority considered the state's interest in the regulation, the wisdom of the state's goals, the regulation's success in reaching the goals set forth by the state, and the competitive advantages and disadvantages of the overall plan.<sup>47</sup> However, the Court introduced a subjective standard by requiring "active" state supervision. Ambiguity regarding adequacy of supervision leads to increased uncertainty in the marketplace and in lower courts.

In *Community Communications Co. v. City of Boulder*,<sup>48</sup> Justice Brennan questioned "[w]hether a 'home rule' municipality, granted by the state constitution's extensive powers of self-government in local and municipal matters, enjoys the 'state action' exemption from Sherman Act liability . . .".<sup>49</sup> Under the Colorado Constitution, the city of Boulder was organized as a "home rule" municipality,<sup>50</sup> entitling the city to self-government privileges in local and municipal matters.<sup>51</sup> In 1964, the city council granted Colorado Televents, Inc.,

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45. *Id.* at 105 n.8. See Note, Parker v. Brown Revisited: *The State Action Doctrine After Goldfarb, Cantor, and Bates*, 77 COLUM. L. REV. 898, 916 (1977).

46. *California Retail Liquor Dealers Ass'n*, 445 U.S. at 106. The Court found that private parties actually established the prices. The state did not review the reasonableness of the prices, nor did the state engage in any "pointed examination" of the program. *Id.*

47. *Id.* at 105-06. See also Burling, Lee & Quarles, *supra* note 28, at 826-27.

48. 455 U.S. 40 (1982).

49. *Id.* at 43.

50. A home rule municipality exists when a constitutional provision or legislative action provides local cities and towns with a measure of self-government, if the local government accepts terms of state legislation. BLACK'S LAW DICTIONARY 660 (5th ed. 1979); *Community Communications Co. v. City of Boulder*, 455 U.S. 40 (1982). It is similar to a "local option" where an option of self-determination is available to a municipality or other governmental unit to determine a particular course of action without specific state approval. *Id.* at 847. See *Rice, Director, Dep't of Alcoholic Beverage Control of Cal. v. Rehner*, 463 U.S. 713 (1983); *Batterton, Secretary, Dep't of Human Resources of Md. v. Francis*, 432 U.S. 416 (1977).

51. The Colorado Home Rule Amendment, COLO. CONST. art. XX, § 6 provides in pertinent part:

The people of each city or town of this state, having a population of two thousand inhabitants . . . , are hereby vested with, and they shall

a twenty-year permit to conduct a cable television business. Colorado Televents subsequently assigned the permit to Community Communications Company in 1966. Until the late 1970s, Community Communications Company served virtually the entire Boulder area. However, with the advent of advanced technology, new markets developed which Community Communications Company sought to capture. They informed the city council of such desire, whereupon the city enacted an emergency ordinance prohibiting Community Communications Company from expanding for a three month period until the council formulated a cable development plan.<sup>52</sup>

Alleging that the ordinance violated the Sherman Act, Community Communications Company filed suit to prevent the city from restricting its proposed business expansion. The district court found in favor of Community Communications Company.<sup>53</sup> The United States Court of Appeals for the Tenth Circuit reversed<sup>54</sup> and the United States Supreme Court granted *certiorari*.<sup>55</sup>

The Court reiterated the fundamental principle that as a nation of states, there is no accommodation for sovereignty in subdivisions of states.<sup>56</sup> In further reflecting on the concept of sovereign cities, the Court stated:

All sovereign authority "within the geographical limits of the United States" resides either with "the Government of

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always have, [the] power to make, amend, add to or replace the charter of said city or town . . . .

Such charter and the ordinances made pursuant thereto in such matters shall supersede within the territorial limits and other jurisdiction of said city or town any law of the state in conflict therewith. It is the intention of this article to grant and confirm to the people of all municipalities coming within its provisions the full right of self-government in both local and municipal matters . . . .

The statutes of the state of Colorado, so far as applicable, shall continue to apply to such cities and towns, except insofar as superseded by the charters of such cities and towns or by ordinance passed pursuant to such charters.

52. Boulder, Colorado Ordinance No. 4473 (1979). The alleged purpose of the statute was to prevent the discouragement of potential competitors from entering the market.

53. *Community Communications Co. v. City of Boulder*, 485 F. Supp. 1035 (D. Colo. 1980). The district court concluded that the "home rule" status applied only to matters of local concern and found cable television to have an effect on interstate commerce. Therefore, Boulder was found subject to antitrust liability.

54. *Community Communications Co. v. City of Boulder*, 630 F.2d 704 (10th Cir. 1980).

55. *Community Communications Co. v. City of Boulder*, 450 U.S. 1039 (1981).

56. *Community Communications Co.*, 455 U.S. at 50.

the United States, or [with] the States of the Union. *There exist within the broad domain of sovereignty but these two.* There may be cities, counties, and other organized bodies with limited legislative functions, but they are all derived from, or exist in, subordination to one or the other of these.”<sup>57</sup>

Responding to the city’s contention that the Home Rule Amendment justified its actions, the Court held that state laws are not determinative. Based upon Congressional intent, the exemption under *Parker* is from federal antitrust laws.<sup>58</sup> Applying the test set forth in *LaFayette* and *Midcal*, the Court found it unnecessary to reach the “active state supervision” prong because Boulder’s ordinance failed to satisfy the “clear articulation and affirmative expression” criterion.<sup>59</sup>

The Court’s forthright and logical analysis of the issue made it eminently clear that those falling within the sphere of complete immunity are provided considerable certainty. The Court further recognized that “those participating in activities that are state regulated, but not wholly antitrust immune, should not be relegated to the status of purely private parties under the antitrust laws.”<sup>60</sup> The Court seemed comfortable in applying the two-prong test and the canon became the guiding criteria for future state action immunity cases.

## V. THE LATEST DECISIONS

By the early 1980s, the Supreme Court had decided hundreds of cases distinguishing state action immunity from antitrust scrutiny. Unlike the situation found when addressing many emotionally charged issues, the change in the composition of the Court over this period was of little consequence in the Court’s attitude toward the state action immunity issue.

*Town of Hallie v. City of Eau Claire*<sup>61</sup> presented the question of whether a city’s refusal to provide sewage treatment facilities to

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57. *Id.* at 53-54 (quoting *United States v. Kagama*, 118 U.S. 375, 379 (1886)).

58. *Id.* at 52 n.15. The Sherman Act is federal legislation and concerns the nation as a whole. Thus, finding state laws undeterminative makes good sense and sound law.

59. *Id.* at 51-52 n.14. The Court described the state’s position regarding the Boulder ordinance as one of “neutrality” and found the element of state contemplation for the anticompetitive actions wholly lacking. *Id.* at 55.

60. Burling, Lee & Quarles, *supra* note 28, at 810.

61. 700 F.2d 376 (7th Cir. 1983), *aff’d*, 105 S. Ct. 1713 (1985) (No. 82-1832).

certain townships, absent their agreement to permit the city to provide the attendant sewage collection and transportation services, was exempt from federal antitrust laws. Plaintiffs were those towns surrounding the city of Eau Claire, Wisconsin, with the only sewage treatment facility in the area.<sup>62</sup> By its refusal to provide treatment facilities to the towns unless they agreed to annexation, the city effectively had prevented the towns from competing in the sewage collection and transportation markets.<sup>63</sup> The towns alleged that the denial of such an opportunity violated the antitrust laws.<sup>64</sup>

In its analysis of the case, the court felt that in authorizing the city to engage in the sewage disposal industry, the state had also contemplated that anticompetitive effects might result.<sup>65</sup> After establishing this premise, the court focused its analysis on whether the city was acting pursuant to a clearly articulated and affirmatively expressed state policy. Relying upon Wisconsin cases<sup>66</sup> and statutes,<sup>67</sup> the court found the city to be acting in furtherance of the "state policy not to burden municipalities with providing services unless they can annex the territory that they service."<sup>68</sup>

However, the court further interpreted an earlier decision in which it had held that active state supervision is unnecessary in order to achieve antitrust immunity when the supervised party is a governmental unit rather than a private party. This distinction was based on the fact that the local governments already are allegedly operating under state-imposed restraints on their policies and delegation of authority.<sup>69</sup>

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62. Plaintiff towns include Hallie, Seymour, Union, and Washington. *Town of Hallie*, 700 F.2d at 376.

63. The disposal of sewage is a three-step process. The sewage must be collected, transported, treated, and disposed of by the treatment facility. *Id.* at 378.

64. The towns also alleged that the refusal of the city to provide sewage treatment facilities violated the Federal Water Pollution Control Act, 33 U.S.C. § 1251 (1978), and a common law duty of a utility to serve. *Id.*

65. *Town of Hallie*, 700 F.2d at 381. See Areeda, *Antitrust Immunity for "State Action"* After LaFayette, 95 HARV. L. REV. 435, 445-46 (1981) [hereinafter cited as Areeda].

66. E.g., *Town of Hallie v. City of Chippewa Falls*, 105 Wis. 2d 533, 314 N.W.2d 321 (1982) (holding Chippewa Falls justified in refusing to provide sewage treatment facilities unless the town agreed to obtain other municipal services from Chippewa Falls).

67. Wis. STAT. §§ 66.069(2)(c), 144.07 (1985) provides, in effect, that a city has no obligation to serve beyond a certain area, and that if a town refuses annexation, the city has no obligation to extend the sewage system.

68. *Town of Hallie*, 700 F.2d at 383.

69. *Id.* at 384. As support for this contention, the court cited: P. AREEDA,

The court thus concluded that the city of Eau Claire was exempt from antitrust liability. It remained to be seen, however, how the Supreme Court would react to the court's finding that active state supervision is unnecessary when a local government is pursuing the anticompetitive conduct. A year later, the opportunity to address this issue was presented to the Supreme Court.

In *Hoover v. Ronwin*,<sup>70</sup> the most recent decision in this area, the Court encountered issues similar to those in *Bates v. State Bar of Arizona*<sup>71</sup> and *Goldfarb*. Ronwin was an unsuccessful applicant for admission to the 1974 Arizona Bar. The Arizona Supreme Court controls admission to the practice of law in the state under authority granted to it by the Arizona Constitution.<sup>72</sup> A committee<sup>73</sup> was established by that court to examine and also recommend applicants for admission to the Arizona bar. The court itself had the ultimate authority to grant or deny admission.<sup>74</sup> Ronwin alleged that the Commission's conduct violated the Sherman Act through an artificial reduction in the number of practicing attorneys in the state of Arizona.<sup>75</sup>

The district court had dismissed Ronwin's complaint for failure to state a claim. The court of appeals reversed, stating that the issue should not have been decided on a motion to dismiss, despite the

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ANTITRUST LAW § 212.2a, at 47 (Supp. 1982); Areeda, *supra* note 65, at 445 & n.49; Rogers, *Municipal Antitrust Liability in a Federalist System*, 1980 ARIZ. ST. L.J. 305, 340-42; Page, *Antitrust, Federalism, and the Regulatory Process: A Reconstruction and Critique of the State Action Exemption After Midland Aluminum*, 61 B.U.L. REV. 1099 (1981) (arguing for total abandonment of the state supervision requirement).

70. 104 S. Ct. 1989 (1984) (No. 82-1474) (Powell, J., delivering opinion).

71. 433 U.S. 350 (1977). *Bates* involved two lawyers who were temporarily prohibited from practicing law in Arizona for violating the disciplinary rule against lawyer advertising. The Arizona Supreme Court had adopted the ABA disciplinary rules. The United States Supreme Court thus held the state bar association immune from Sherman Act liability because its enforcement of the rules was determined to be state action. *Id.* at 359-60.

72. See *Hunt v. Maricopa County Employers Merit Sys. Comm'n*, 127 Ariz. 259, 261, 619 P.2d 1036, 1038-39 (1980) (construing ARIZ. REV. STAT. ANN. § 32-275 (1956)); *Hoover*, 104 S. Ct. at 1991.

73. Petitioners (*Hoover* and others) were four members of the Arizona Supreme Court's Committee on Examinations and Admissions. *Hoover*, 104 S. Ct. at 1991.

74. *Id.* at 1992 n.7.

75. *Id.* at 1994. Ronwin's claim that the number of lawyers was artificially reduced seems trivial in that it is an obvious and desirable goal to admit only the most qualified candidates. Ronwin further claimed the committee's actions constituted an abuse of discretion and a deprivation of due process and equal protection.

possible applicability of state action immunity.<sup>76</sup> Relying on the *Parker* rationale, the *Hoover* Court found that "when a state legislature adopts legislation, its actions constitute those of the State . . . and *ipso facto* are exempt from the operation of the antitrust laws."<sup>77</sup> Following the *Bates* holding that a state supreme court should be treated as a state legislature when acting in a legislative capacity, the court reasoned that the decision of the Arizona Supreme Court at issue should also be exempt from Sherman Act liability as state action.<sup>78</sup>

Reviewing its earlier decisions, the Court noted findings pertinent to the determination of the issue in the present case. The Court reiterated that closer scrutiny is necessary when the activity is not the direct action of the legislature or supreme court, but, rather, is action taken by others pursuant to state authorization.<sup>79</sup> Correspondingly, where the action is directly that of the state legislature or supreme court, it is unnecessary to address "clear articulation" and "active supervision."<sup>80</sup> The critical issue, therefore, becomes whether the challenged conduct is that of the court. If answered affirmatively, the *Parker* doctrine apparently applies and Ronwin is without a cause of action under the Sherman Act.<sup>81</sup>

The Court correctly found the activities of the Commission to be indistinguishable from those of the Arizona Supreme Court. Each petitioner was a member of an official body literally created by the court. The court and committee worked hand in hand when dealing with the bar examination. While the committee compiled, graded, and recommended action concerning the bar exam, the court had strict supervisory power and authority over the committee's actions.<sup>82</sup> Thus, the Court properly found that Ronwin was in reality challenging the conduct of the Supreme Court of Arizona.<sup>83</sup>

The Court emphasized that its holding was derived "directly"

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76. *Ronwin v. State Bar of Ariz.*, 686 F.2d 692 (9th Cir. 1982).

77. *Hoover*, 104 S. Ct. at 1995. See also *Town of Hallie v. City of Eau Claire*, 53 U.S.L.W. 3411, 3415 (U.S. Dec. 4, 1984).

78. *Hoover*, 104 S. Ct. at 1995.

79. *Id.* See, e.g., *Community Communications Co.*, 455 U.S. at 48-51; *California Retail Liquor Dealers Ass'n*, 445 U.S. at 103-06; *New Motor Vehicle Board of Cal. v. Orrin W. Fox Co.*, 439 U.S. 96 (1978).

80. *Hoover*, 104 S. Ct. at 1996. The Court adopted the notion that governmental units are inherently more trustworthy than parties in the private sector.

81. *Id.*

82. *Id.* at 1997.

83. *Id.* at 1997-98. See also *Bates*, 433 U.S. at 361.

from *Parker* and *Bates*, and stated that adoption of the dissent's position would "emasculate" the state action immunity doctrine.<sup>84</sup> The majority stressed that where the action complained of was that of the state itself, "the action is exempt from antitrust immunity [sic, antitrust liability] regardless of the State's motives in taking the action."<sup>85</sup> Applying this standard to the facts required reversal of the court of appeals and a finding that the committee was indeed exempt from antitrust liability.

## VI. THE LONG AWAITED LEGISLATIVE RESPONSE

Primarily in response to uncertainty of local governments and the increased number of suits against them, Congress finally passed the Local Government Antitrust Act of 1984.<sup>86</sup> In formulating the Act, Congress was forced to balance the national policy favoring

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84. *Hoover*, 104 S. Ct. at 2001. In a dissenting opinion, Justice Stevens, joined by Justices White and Blackmun, argued that the action of the committee was not the action of the Arizona Supreme Court and, in essence, would allow Sherman Act plaintiffs to look at the motivational aspect of state sovereigns. *Id.* at 2009-10 (Stevens, J., dissenting).

However, the majority correctly disregarded the motivational aspects of the state. Allowing plaintiffs to question state motivations would arguably lead to an avalanche of litigation, with many actions presumably based upon unfounded contentions and imagined motivations.

85. *Id.* at 2001.

86. Pub. L. No. 98-544, 98 Stat. 2750 (1984). 15 U.S.C. §§ 34-36 provide in pertinent part:

SEC. 1. This Act may be cited as "Local Government Antitrust Act of 1984."

SEC. 2. For the purpose of this Act—

(1) the term "local government" means—

(A) a city, county, parish, town, township, village, or any other general function governmental unit established by State law, . . .

(2) the term "person" has the meaning given to it in subsection (a) of the first section of the Clayton Act (15 U.S.C. 12(A)), but does not include any local government as defined in paragraph (1) of this section, and

(3) the term "State" has the meaning given it in section 4G(2) of the Clayton Act (15 U.S.C. 15g(2)).

SEC. 3. (a) No damages, interest on damages, costs, or attorney's fees may be recovered under section 4, 4A or 4C of the Clayton Act (15 U.S.C. 15, 15a, or 15c) from any local government, or official, or employee thereof acting in an official capacity . . .

SEC. 4. (a) No damages, interest on damages, costs or attorney's fees may be recovered under section 4, 4A or 4C of the Clayton Act (15 U.S.C. 15, 15a, or 15c) in any claim against a person based on any official action directed by a local government, or official or employee thereof acting in an official capacity.

competition against the policy encouraging the valid function of local governments, as well as balancing the disruptiveness to local governments against the incentive provided for local governments to engage in anticompetitive conduct.<sup>87</sup> While the Act does not grant local governments full-fledged immunity, it sets forth a remedy against local governments engaging in unprotected anticompetitive behavior.

Money damages are unavailable, and it should be noted that states receive direct *Parker* immunization. (They are not included in the Act's definition of "local government."<sup>88</sup>) It should be noted further that section four of the Act requires that conduct need only be "directed" by a local government for a nongovernment party to be shielded from liability. Given judicial difficulty in grappling with such terminology, Congress should have provided a more concrete standard.

Businesses contracting with local governments generally will not be encompassed by the Act absent an express exception.<sup>89</sup> The House Report notes further that "good faith" errors by local governments in conducting public business should be covered under the Act to alleviate pressure further on local governments.<sup>90</sup>

The passage of the Act represents a positive step. The legislature has assumed an active role in confronting the direct application of state action immunity to local governments. However, the Act is not sufficiently comprehensive. It is deficient in its failure to provide clear guidelines for courts to apply. Such standards are exactly what is needed. Nonetheless, local governments should welcome the reality that, under the proper circumstances, they are not liable for monetary damages. Additionally, they should be relieved that the legislature has finally confronted the problem. Hopefully, more comprehensive and expansive legislation shall be forthcoming.

## VII. CONCLUSION

In 1943, the Court established the principle that states or bodies carrying out state action should be immune from antitrust liability

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87. H.R. REP. No. 965, 98th Cong., 2d Sess. 7 (1984). These same factors have been considered by the judiciary for some time.

88. *Id.* at 9. This further demonstrates the dire circumstances encountered by local governments. The Act originated solely to grant them relief.

89. *Id.* at 21. This is in conjunction with the Court's general feeling that businesses with a financial stake in their interactions with the government need stricter supervision.

90. *Id.* at 20.

under the Sherman Act. This new idea was based upon the sound rationale that states should be able to conduct necessary activities for the betterment of their constituents without liability intended primarily for the private sector. After relative inactivity during the 1950s and 1960s, the issue presented itself to the courts with a vengeance in the 1970s. Each successive Court formulated new standards; set forth new factors to be considered; and modified for better, and sometimes for worse, prior judicial decisions. Throughout this period, there was a noticeable absence of legislative input.

However, in the early 1980s, the Court for the first time appeared both comfortable and assured in applying the state action immunity doctrine. This newfound predictability allows parties on both sides of the issue to be more fully apprised of their positions before entering litigation. Possibly, the passage of time will see courts confronting a new problem in a direct and assertive manner. Given support by the legislative branch, this will more readily become a reality.

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